

***National Labor Relations Board***  
**OFFICE OF THE GENERAL COUNSEL**  
**Advice Memorandum**

June 26, 1992

Elizabeth Kinney, Regional Director, Region 13; Robert E. Allen, Associate General Counsel, Division of Advice

Murphy and Miller, Inc., Case 13-CA-30932

240-3367-5075

This Section 8(a)(1) and (3) case was submitted for advice as to whether we should defer under Olin Corp. <sup>(1)</sup> to an oral grievance settlement between the Union and the Employer where the agreement provided that the Charging Party be reinstated to a distant facility without backpay.

**FACTS**

Charging Party Pauley was employed by the Employer for eight years. During the course of his employment he frequently raised contractual complaints about working conditions. In November or December 1991, Pauley invoked the contract and claimed time for a meeting called by his supervisor, Varco. Varco disallowed the time and told Pauley he would be terminated if he claimed time or complained to the Union. In early December 1991, the Employer issued a revised Truck Operators Agreement and required the servicemen to sign it. Pauley called the Union to complain and was told not to sign the agreement. He also counseled other employees about not signing the agreement. On March 23, 1992, Varco held an employee meeting at 7: 30 a.m.; Pauley was the only employee who claimed time for the meeting. When Pauley received his paycheck on April 7 and realized he had not been paid for the March 23 meeting, he complained to the Union. Later that day, Varco told Pauley he was being laid off because he claimed time for the March 23 meeting and also because of his "bad attitude."

Pauley filed a grievance on April 8, 1992, alleging the Employer's failure to compensate him for the March 23 meeting and the layoff as violations of the collective-bargaining agreement. In order to settle the grievance, the Employer verbally offered to reinstate Pauley without backpay to a different facility in light of an alleged "personality conflict" between Pauley and Varco and to pay him for the one hour March 23 meeting. The Employer also agreed to review the Truck Operators Agreement. The Union communicated this offer to Pauley, who rejected it because the transfer would impose a significantly longer commute of 25 miles in heavier traffic and because it did not provide for backpay. The Union business agent took the position that the proposed offer was adequate and, therefore, considered the grievance settled. Pauley has not returned to work. The Region has concluded that if Olin deferral is not warranted, the Employer's threats to and discharge of Pauley were in retaliation for his assertion of contractual rights and violated Section 8(a)(1) and (3).

**ACTION**

We conclude that the Region should not defer to the parties' settlement agreement because both the failure to provide for backpay and the transfer to a more distant location are clearly repugnant to the policies of the Act.

The Board has held that the deferral standards of Olin, *supra*, and Spielberg Mfg. Co. <sup>(2)</sup> should be applied where the grievance is settled short of arbitration <sup>(3)</sup> even where the grievant objects to the terms of the settlement agreement. <sup>(4)</sup> Therefore, Olin deferral standards apply to the settlement herein even though it was not reduced to writing. In this regard, we note that the Union agreed that the Employer's proposal effectively resolved the dispute, and there is no requirement in the parties' grievance-arbitration procedure that first-step grievance resolutions be written. <sup>(5)</sup>

We conclude that the settlement agreement here was "palpably wrong" in its failure to provide for backpay. We recognize that the Board has deferred to grievance settlements and arbitration decisions that awarded no backpay where the employee had engaged in some type of misconduct which arguably caused him or her to lose the protection of the Act. <sup>(6)</sup> However, in Cone

Mills Corporation,<sup>(7)</sup> the arbitrator and the Board found that the discriminatee was discharged in retaliation for her protected concerted activity as shop steward. Although the arbitrator ruled that the employee was discharged in violation of the Act, his remedy included only reinstatement and not backpay. The Board found that deferral was not warranted because the arbitrator's decision was clearly repugnant to the purposes and policies of the Act. The Board noted that the employee was discharged for union activity and "in spite of the absence of any finding that [the employee] engaged in conduct in response to the Respondent's provocation that was so extreme or egregious as to be unprotected," the arbitrator nevertheless concluded that her insubordination was sufficient to warrant denial of backpay. <sup>(8)</sup> "Absent such misconduct, the arbitrator's refusal to award [the employee] backpay has the effect of penalizing [the employee] for engaging in those protected activities that the arbitrator found precipitated her discharge, a result that is plainly contrary to the Act." <sup>(9)</sup>

Under Olin, "the facts presented to, and found by, the arbitrator are central to determining repugnancy." <sup>(10)</sup> Here, since there is no arbitral award, our conclusion that the grievance settlement was palpably wrong must be based on the Region's determination of the facts explicitly or implicitly relied upon by Employer and Union in reaching the settlement. The Region has found that Pauley was discharged for his numerous attempts to enforce the collective bargaining agreement. As in Cone Mills, there is apparently no evidence that he engaged in any misconduct which would make him lose the protection of the Act. In this regard, the Region has apparently determined that Pauley's alleged "bad attitude" and possible "personality conflict" refer only to the frequent exercise of his Section 7 activity of invoking contractual rights. <sup>(11)</sup> Accordingly, we conclude that the lack of backpay in the settlement agreement is "clearly repugnant" to the policies of the Act. <sup>(12)</sup>

Similarly, the settlement provision transferring Pauley to a more distant facility is also repugnant to the Act. Thus, the Employer is continuing its unlawful conduct by conditioning Pauley's reinstatement on his acceptance of a longer commute. The Employer's asserted reason for the transfer, i.e. to avoid a personality conflict between Varco and Pauley, does not warrant a contrary result. The Region has determined that the only evidence of a possible "personality conflict" between Varco and Pauley was his frequent attempts to enforce the collective-bargaining agreement. Clearly, the imposition of a longer and more onerous commute in these circumstances constitutes retaliation against Pauley for his Section 7 activity. <sup>(13)</sup>

Accordingly, Olin deferral is not warranted and the Region should issue a Section 8(a)(1) and (3) complaint, absent settlement.

R.E.A.

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<sup>1</sup> 268 NLRB 573 (1984).

<sup>2</sup> 112 NLRB 1080 (1955).

<sup>3</sup> Alpha Beta Co., 273 NLRB 1546, 1547 (1985), pet. for review denied sub nom. Mahon v. NLRB, 808 F.2d 1342 (9th Cir. 1987), where the Board deferred even though the settlement agreement did not contain backpay. In that case, the employees voted to accept the settlement agreement and then continued to pursue their previously filed unfair labor practice charges with the Board.

<sup>4</sup> U.S. Postal Service, 300 NLRB No. 23 (September 28, 1990).

<sup>5</sup> See, Article 13, Section 5(a) of the parties' contract.

<sup>6</sup> See, e.g., Catalytic, Inc., 301 NLRB No. 44, slip op. at 3-4, 11 (January 28, 1991) (deferral to grievance settlement providing for reinstatement without backpay where employee allegedly engaged in "gross insubordination" by countermanding the employer's orders regarding reporting times); Combustion Engineering, 272 NLRB 215, 216-217 (1984) (deferral where arbitrator denied backpay based on one employee's "poor attitude towards improving his performance" and another employee's "obdurate attitude towards improving his attendance.")

<sup>7</sup> 298 NLRB No. 70 (May 25, 1990).

<sup>8</sup> Id., slip op. at 14.

<sup>9</sup> Id., slip op. at 15. See also *Consolidated Freightways*, 290 NLRB 771, 773 (1988), in which the Board found that an employer's offer of reinstatement was based on a repugnant arbitral award which had omitted backpay and, therefore, deferral was not warranted. The Board held that "to defer here to the arbitrator's remedy would permit the Respondent to discipline an employee for activity found by us and the arbitrator to be protected; clearly not an 'interpretation consistent with Board policy.'"

<sup>10</sup> Id., slip op. at 14, footnote 16.

<sup>11</sup> [FOIA Exemption 5].

<sup>12</sup> See also *Garland Coal & Mining Co.*, 276 NLRB 963, 965 (1989) (arbitrator's finding of insubordination when employee refused to obey order to sign a memo was "not susceptible to any interpretation consistent with the Act" where employee's conduct was in support of union's interpretation of collective bargaining agreement and, in reducing the discharge to a 3-week suspension, the arbitrator noted that when the employee disobeyed the order, he did not engage in "conduct which can be reasonably and objectively viewed as unacceptable.")

<sup>13</sup> See, *Armour Con-Agra*, 291 NLRB 962, 965-969 (1988) (transfer to a less desirable shift in retaliation for union activity); *The Kroger Co.*, 228 NLRB 149, 150 (1977) (retaliatory transfer which employee could not accept because she lacked transportation).